Filed 4/11/19 P. v. Donely CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CHRISTOPHER DONELY, Defendant and Appellant.	D073715 (Super. Ct. No. SCD273714)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian III, Judge. Affirmed.

Andrea Bitar, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie A. Garland, Assistant Attorney General, and Warren Williams, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Michael Christopher Donely of one count of first degree burglary of an inhabited dwelling (Pen. Code, §§ 459, 460)[1] and two counts of identity theft (§ 530.5, subd. (a)). Following his conviction, Donely admitted the alleged prison prior.

At the sentencing hearing, the court imposed a total prison term of five years, consisting of the middle term of four years for the burglary count, two years for each identity theft count to be served concurrently, and one year, served consecutively, for the prison prior enhancement. Donely filed a timely notice of appeal.

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. In that brief, counsel indicated she could not identify any arguable issues for reversal on appeal and requested this court to review the record for error as mandated by *Wende*. As part of our review, we solicited supplemental briefing from the parties on the issue of whether the conduct underlying Donely's identity theft convictions fell within the definition of "shoplifting" included in section 459.5, a new offense created in 2014 following the voters' approval of Proposition 47. As discussed *post*, we are satisfied that although it is an arguable issue, Donely's identity theft convictions do not fall within the definition of shoplifting. Accordingly, we affirm.

FACTUAL BACKGROUND

In August 2017, a security camera captured video of a man resembling Donely getting out of a car resembling one registered to Donely. In the video, Donely appeared to be walking toward a house occupied by his victim, who had left her garage door open

1 All subsequent statutory references are to the Penal Code.

while she was gardening outside. Later that afternoon, the woman noticed two jewelry boxes and her purse were missing from her bedroom. She later found the purse in her garage, but her keys, cell phone, and billfold were missing.

Donely's victim checked her bank account, which showed two charges on her debit card the same day as the burglary. One charge was in the amount of $25.55 at a gas station. The second charge was made at a car wash in the amount of $10.95. The victim did not authorize anyone to use her card at those locations.

A security camera at a gas station captured video of a person putting gas into a truck resembling one registered to Donely at the same time as the debit card charge. The manager of the car wash provided the police with a copy of a purchase form filled out in the name of Donely's victim, but with vehicle information for the same truck registered to Donely.

DISCUSSION

Considering that the *Wende* brief filed by appellant raised no arguable issues, the supplemental briefing filed in response to our request raises the sole arguable issue on appeal, which concerns the propriety of Donely's identity theft convictions pursuant to section 530.5, subdivision (a).[2] Specifically, this appeal involves an issue currently

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2 After his counsel filed the *Wende* brief but before we requested supplemental briefing, Donely elected to file his own supplemental brief raising multiple claims. We have independently reviewed the record under *Wende* and considered the possible issues raised by Donely, but conclude those issues do not establish a basis for reversal. We therefore confine our discussion in this opinion to the sole arguable issue briefed by appellate counsel in response to our request.

under review in the California Supreme Court regarding the impact of Proposition 47, which created a new misdemeanor offense of shoplifting under section 459.5, on the felony offense of identity theft.[3] In his supplemental brief, Donely contends he should have been charged with misdemeanor shoplifting instead of felony identity theft and his conviction must be reduced accordingly.

In 2014, California voters passed Proposition 47, known as the Safe Neighborhoods and Schools Act, which reduced penalties for certain theft and drug offenses by amending existing statutes. (*People v. Gonzales* (2017) 2 Cal.5th 858, 863.)

Additionally, Proposition 47 created the new misdemeanor offense of "shoplifting." The new offense, defined in section 459.5, provides: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (*Id.*, subd. (a).) Section 459.5 further states that shoplifting shall be punished as a misdemeanor and "[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (*Id.*, subd. (b).)

As a result, even if the elements of a separate burglary or theft offense could be met by an act that also meets the definition of shoplifting under subdivision (a) of section

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[3] A violation of section 530.5, subdivision (a) is a "wobbler" offense, chargeable as either a misdemeanor or felony and punishable accordingly. Here, Donely was charged and convicted of identity theft as a felony offense.

459.5, then subdivision (b) prohibits the prosecution from charging the defendant with that separate offense instead of, or in addition to, the offense of shoplifting. Here, Donely was not charged with an obvious "burglary or theft offense," but rather with violation of section 530.5, commonly referred to as "identity theft." At the time of Donely's trial and conviction, the law was unsettled regarding whether conduct sufficient to establish the offense of identity theft under section 530.5 could fall within the new definition of shoplifting under section 459.5. The uncertainty remains.

In *People v. Sanders* (2018) 22 Cal.App.5th 397 (review granted July 25, 2018, S248775) (*Sanders*), the defendant discovered a credit card on the ground and used the card to buy cigarettes and a beverage at a convenience store and to obtain cash at a restaurant. (*Id.* at p. 400.) The total amount of the charges on the card was $174.61. (*Ibid.*) This court considered the same issue raised by this appeal and concluded Proposition 47 had no effect on the offense defined by section 530.5, subdivision (a), because it is not a "theft" offense despite it being colloquially referred to as "identity theft."

Sanders explained that the application of Proposition 47's "monetary threshold for felony punishment" turned on whether the "offenses at issue were in whole or in part based upon theft from the victim." (*Sanders*, *supra*, 22 Cal.App.5th at p. 403.) We concluded identity theft is not a "theft offense" even when the victim's identity is used to obtain property from a merchant by false pretenses. (*Ibid.*) "The basic problem is appellant's acts of stealing from merchants do not amount to a theft from the cardholder. The cardholder was harmed by the unlawful use of her card and thefts from the

merchants do not make the cardholder a victim of those thefts." (*Ibid.*; see also *People v. Truong* (2017) 10 Cal.App.5th 551, 561 ["Although commonly referred to as 'identity theft' [citation], the Legislature did not categorize the crime as a theft offense."].) Thus, we concluded that "[i]dentity theft is not actually a theft offense. Rather it seeks to protect the victim from the misuse of his or her identity." (*Sanders*, *supra*, 22 Cal.App.5th at p. 405.) Accordingly, we held the crime of shoplifting as defined in section 459.5 does not encompass the offense of identity theft as defined by section 530.5, subdivision (a). (*Sanders*, at pp. 405-406.)

We recognize other courts have reached a different conclusion. For example, in *People v. Jimenez* (2018) 22 Cal.App.5th 1282 (review granted July 25, 2018, S249397) (*Jimenez*), the Second District, Division Six, Court of Appeal concluded a defendant's convictions for identity theft arising from his use of stolen checks valued at less than $950 each constitute misdemeanor shoplifting under section 459.5. (*Jimenez*, at p. 1285.)

As noted, the Supreme Court has granted review of both *Sanders* and *Jimenez* and will ultimately resolve the split in authority. In the interim, while acknowledging the split in authority, we discern no compelling reason to depart from our prior opinion in *Sanders*. (See *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1598 ["despite the inevitable differences among justices of appellate courts, stare decisis remains a vital principle. We hesitate to overrule a decision rendered by another panel of this court except for compelling reasons."].) Accordingly, pending further guidance from our Supreme Court, we follow the reasoning of *Sanders* and conclude Donely was properly

charged and convicted of the felony offense of identity theft and the new misdemeanor offense of shoplifting as defined by section 459.5 has no effect on his convictions.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.